SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 77

GEORGE W. SOLESBEE, APPELLANT,

vs.

R. P. BALKCOM, JR., WARDEN OF THE STATE PENITENTIARY, TATTNALL, GEORGIA

APPEAL FROM THE SUPREME COURT OF THE STATE OF GEORGIA

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 20, 1949.

—3031

[fol. 1]

IN SUPERIOR COURT OF TATTNALL COUNTY

GEORGE W. SOLESBEE

vs.

R. P. BALKCOM, JR.

Bill of Exceptions—Filed December 11, 1948

STATEMENT OF PROCEEDINGS

Be it remembered that on the 17th day of November, 1948, George W. Solesbee presented his petition for a writ of habeas corpus against R. P. Balkcom, Jr., warden of the State penitentiary at Tattnall, Georgia, in the County of Tattnall, to the Honorable M. Price, Judge of the Superior Courts of the Atlantic Judicial Circuit, and upon presentation thereof said Judge duly granted such writ, and made it returnable before him at Ludowici, in the County of Long, of said State, on the 27th day of November, 1948, at 11:00 a. m., and on that date the respondent appeared and produced the body of said George Solesbee, and then and there interposed a demurrer to said petition for writ of habeas corpus as follows:

DEMURRER TO PETITION

"Now comes the respondent in the above stated case and, before pleading to the merits of said case, files this his demurrer to said petition and for grounds thereof says:

"1. That there is no cause of action set out in said petition.

"2. That if the sentence of death passed by Honorable W. R. Smith, Judge of the Superior Court of the Alapaha Circuit was void, that this question is now moot as the time for execution of the said George W. Solesbee named in said sentence has already passed and it will be necessary for him to be resentenced before he can be put to death by electrocution.

"3. Respondent says further that there is no conflict between the two Code sections referred to in paragraph 5 in said petition; that the method provided by law for inquir-

ing into the sanity of a person already under sentence of death is not in violation of the Constitution of Georgia nor [fol. 2] the Constitution of the United States, and that the method provided for does not deprive a person of his life without due process of law.

"Wherefore, respondent prays that this demurrer be inquired into by the court and that the petition for habeas corpus be dismissed."

JUDGMENT SUSTAINING DEMURRER

And, after argument on said demurrer, the judge thereupon entered the following judgment, to wit:

"After hearing argument on the within demurrer and after consideration thereof, it is adjudged by the Court that the within demurrer be, and the same is hereby sustained and said petition is hereby dismissed, on the ground that section 27-2602 of the Civil Code affords due process of law to the applicant, which redress was afforded in the instant case by reason of the fact as alleged in said petition; the governor appointing a commission for the purpose of determining the question of the applicant's sanity or insanity, and said commission rendering a finding that the applicant was sane.

"This being the judgment of the Court, said applicant is hereby remanded to the custody of said respondent.

"At Chambers, Ludowici, Georgia, This Nov. 27, 1948."

(S.) M. Price, J. S. C., A. C.

EXCEPTIONS

To which said judgment sustaining said demurrer plaintiff in error then and there excepted, now excepts and says that the judge erred in sustaining such demurrer upon each and every ground thereof which was ruled upon by the Court (it being admitted that that portion of the petition for the writ of habeas corpus which alleged that the sentence imposed upon petitioner was void because it had been imposed at a time when the court had no jurisdiction to do so had become moot in that the date for such execution had passed and another would have to be fixed, but the court did hear and pass upon the other ground set out in said demurrer); and now within twenty (20) days from the enter-

[fol. 3] ing of said judgment and within the time allowed by law, comes George W. Solesbee, naming himself as plaintiff in error, and said R. P. Balkcom, Jr., as defendant in error, and presents this bill of exceptions to the judgment sustaining said demurrer and specifies the following parts of the record, other than as set out herein, as necessary to a clear understanding of the errors complained of, to wit:

(1) The original petition for the writ of habeas corpus filed in the office of the Clerk of the Superior Court of Tattnall County on the 18th day of November, 1948, together with the acknowledgment of service thereon.

(2) Affidavit in forma pauperis filed herewith.

(3) This original bill of exceptions.

Wherefore, Plaintiff in error prays that this his bill of exceptions be certified as true, and the Clerk of the Superior Court of Tattnall County, be required to make out and certify under his hand and official seal the parts of the record herein specified and transmit the same to the Supreme Court of the State of Georgia together with this original bill of exceptions, in order that the errors complained of may be inquired of and corrected.

This 9 day of December, 1948.

Pierce Bros., Attorneys for Plaintiff in Error.

[fol. 4] JUDGE'S CERTIFICATE

STATE OF GEORGIA:

I hereby certify that the within bill of exceptions is true and that it contains and specifies all parts of the record necessary to a clear understanding of the errors complained of, and the Clerk of the Superior Court of Tattnall County is hereby directed to make out and certify under his hand and seal, such parts of the record as are specified therein, and transmit the same to the Supreme Court of the State of Georgia, together with the original bill of exceptions within the time allowed by law, in order that the errors complained of may be inquired of and corrected. It is ordered further that this bill of exceptions act as a supersedeas to said

judgment complained of until the same shall have been passed upon by the Supreme Court.

This 10th day of December, 1948.

M. Price, J. S. C., A. C.

Presentation of the within bill of exceptions is hereby waived and the same is true and correct.

Eugene Cook, Atty. Gen.; R. N. Odum, Dep. Asst. Atty. Gen., Attorneys for Respondent.

Due and legal service of a copy of the within bill of exceptions is hereby acknowledged. All further service and notice is waived.

This 11th day of December, 1948.

Eugene Cook, Atty. Gen.; R. N. Odum, Dep. Asst. Atty. Gen., Attorneys for Respondent; R. P. Balkcom, Jr., Warden.

[fol. 5] [File endorsement omitted.]

[fol. 6] Clerk's Certificate to foregoing bill of exceptions omitted in printing.

[Endorsed:] Case No. 16537. January Term, 1949. Supreme Court of Georgia. George W. Solesbee versus R. P. Balkcom, Jr. Bill of Exceptions. Filed in office December 27, 1948. Henry H. Cobb, D. C. S. C. Ga.

[fol. 7] In the Superior Court of Tattnall County

George W. Solesbee

vs.

R. P. Balkcom, Jr.

Petition for Writ of Habeas Corpus—Filed November 18, 1948

To The Honorable Melville Price, Judge Thereof:

The petition of George W. Solesbee respectfully shows:

1. That he is now incarcerated in the State penitent-ary at Reidsville, Georgia, where he has been ordered put to death by electrocution on the 20th day of November, 1948,

by R. P. Balkcom, Jr., the warden of said penitentiary, in pursuance of an order of the Honorable W. R. Smith, Judge of the Superior Court of the Alapaha Circuit, presiding at Homerville in the County of Clinch, State of Georgia, on the fifth (5th) day of November, 1948.

2. That there was no power or authority in the said Judge W. R. Smith to pass said order on said date, because the court over which he was presiding has no jurisdiction over your petitioner for the purpose of passing such order, in that petitioner had been granted a respite by the Governor of the State of Georgia, suspending the execution of a previous sentence imposed upon petitioner until the eighth (8th) day of November, 1948, and such order of the said Hon. W. R. Smith, Judge of the aforesaid, was dated on the 5th day of November, 1948, three (3) days prior to the expiration of the respite which had been granted, and to execute your petitioner in pursuance of the order of November 5, 1948, would be to execute contrary to law and in violation of Article I, Section I, Paragraph 3 (Code 2-103) of the 1945 Constitution of the State of Georgia, which provides: "No person shall be deprived of life, liberty or property, except by due process of law" and would also be in violation [fol. 8] of the 14th amendment to the Constitution of the United States, which is codified in the Georgia Code of 1933, in Section 1-815, which provides in part "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." And petitioner says that he is within the jurisdiction of the State of Georgia and entitled to the equal protection of the law as granted by both the Constitution of the State of Georgia, and the Constitution of the United States.

3. That the State of Georgia has no authority to execute your petitioner without complying with every provision of law and since the respite granted him by the Governor of the State of Georgia, has not expired, it was illegal in said Honorable W. R. Smith, to enter the order of November 5, 1948, and reimpose upon your petitioner a sentence of death prior to the expiration of the respite as aforesaid.

4. Your petitioner alleges that to deprive him of his life under the order entered, would be to further violate

his rights as granted under the above quoted section of the Constitution of the State of Georgia, and also the above quoted provisions of the Fourteenth Amendment of the Constitution of the United States, because petitioner alleges that he is insane at this time and can not be executed and there is no provision of law under the State of Georgia whereby he can obtain any legal adjudication as to whether he is sane or insane since there is no provision under the Georgia laws whereby the question of his sanity or insanity can be judicially determined, and no sentence of death can be legally imposed upon him.

5. That the only provision of law in the State of Georgia with reference to the manner in which one claims to have [fol. 9] become insane subsequent to the entrance of a sentence of death is Section 27-2602 of the Code of the State of Georgia, which is:

"27-2602. (1074 P. C.) Disposition of insane convicts. Cost of investigations.—Upon satisfactory evidence being offered to the Governor that the person convicted of a capital offense has become insane subsequent to his conviction, the Governor may, within his discretion, have said person examined by such expert physicians as the Governor may choose, and said physicians shall report to the Governor the result of their investigation; and the Governor may, if he shall determine that the person convicted has become insane, have the power of committing him to the Milledgeville State Hospital until his sanity shall have been restored, as determined by laws now in force. The cost of the investigation shall be paid by the Governor out of the contingent fund. (Acts, 1903, p. 77).

And since the passage of the acts of 1903, page 77, codified in the Code of the State of Georgia, of 1933, at Section 27-2601, expressly prohibits anyone from having an "inquisition or trial to determine his sanity," which said section is in full as follows:

"27-2601 (1703 P. C.) No inquisition after capital conviction: No person who has been convicted of a capital offense shall be entitled to any inquisition or trial to determine his sanity. (Acts 1903, p. 77)."

And petitioner charges that to execute him without any judicial proceeding whereby and wherein petitioner would be entitled to produce evidence as to his sanity and to be

represented at a hearing for that purpose by counsel, would be to deprive him of his life without notice or hearing and without any opportunity of petitioner's to obtain an original court hearing and adjudication of his sanity or to review the findings of any doctor's conclusions with reference thereto.

[fol. 10] That thereon application was made to the [sic] Governor under the above section, was appointed 3 physicians to examine petitioner and they reported him sane but petitioner alleges that any inquisition which the Governor might set up under the section which the Governor might set up under the section of the Code quoted above would be a mere matter of grace and no order "passed as a matter of grace and not because of any provision of law would be in conflict with due process clause of the Constitution of the State and of the Fourteenth Amendment of the Constitution of the United States" and therefore void and such had been declared to be the law in numerous instances (see Piggly-Wiggly Ga. Co. v. May Investor Corp., 189 Ga. p. 477).

Wherefore, petitioner prays that this Court grant him a writ of habeas corpus requiring R. B. Balkcom, Jr., warden of the State Penitentiary at Reidsville, to produce the body of your petitioner on a date and time to be fixed by this court that the legality of his incarceration may be determined and also the legality of the authority under which he, the said R. P. Balkcom, Jr., as warden aforesaid, is purporting to act in the execution of your petitioner under said order of sentence entered by the Honorable W. R. Smith, as alleged in his petition for writ of habeas corpus, and that the said R. P. Balkcom be temporarily restrained from execution of petitioner until a hearing can be had on this petition and petitioner will ever pray.

Pierce Bros., Attorney for Petitioner.

[fol. 11] *Duly sworn to by George W. Solesbee. Jurat omitted in printing.*

ORDER ON PETITION

STATE OF GEORGIA,
Tattnall County:

The foregoing petition for the writ of habeas corpus read and considered. It is hereby ordered that a copy thereof together with this rule be served upon R. P. Balkcom, Jr., as warden of the penitentiary of the State of Georgia, at Reidsville, Georgia, within the county of Tattnall. It is ordered further that the said R. P. Balkcom, Jr., warden as aforesaid, appear before me at the court house in Long County, Ludowici, Georgia, on the 27 day of November, 1948, at 11:30 o'clock a. m. and produce at such hearing the body of said George W. Solesbee, in order that the legality of his incarceration may be inquired into and determined and also the legality of such authority as the said R. P. Balkcom, Jr., warden as aforesaid, is purporting to execute the death sentence upon the said George W. Solesbee. Ordered further that the said R. P. Balkcom, Jr., warden as aforesaid, be and he is hereby temporarily restrained from proceeding further with execution of said [fol. 12] George W. Solesbee until the further order of this court.

This 17 day of November, 1948.

M. Price, J. S. C. A. C.

Due and legal service of a copy of the foregoing petition for habeas corpus and this writ is hereby acknowledged. All other and further service is hereby waived.

This 18th day of November, 1948.

R. P. Balkcom, Jr., Warden.

[File endorsement omitted.]

IN SUPERIOR COURT OF TATTNALL COUNTY

AFFIDAVIT IN FORMA PAUPERIS—Filed December 11, 1948

Personally appeared before the undersigned officer, authorized by law to administer oaths, George W. Solesbee, who on oath deposes and says that he is plaintiff in error

in a bill of exceptions certified by the Honorable M. Price, Judge of the Superior Courts of the Atlantic Circuit, in the case of George W. Solesbee v. R. P. Balkcom, Jr., warden of the State penitentiary, and that because of his poverty, he is unable to pay the costs of giving bond for the eventual condemnation in said cause in the lower court, or to pay the costs of court in the Supreme Court, and in lieu of such bond this affidavit is made.

George W. Solesbee.

Sworn to and subscribed before me this 11 day of Dec., 1948. George Pierce, Notary Public State at Large, Georgia.

[File endorsement omitted.]

[fol. 13] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 14] IN SUPREME COURT OF GEORGIA

No. 16537

SOLESBEE

v.

BALKCOM, JR., Warden

OPINION—March 14, 1949

By the COURT:

1. A stay of execution is not based on any inherent right of one who has been convicted and sentenced to suffer death for the offense of murder, and such person is not entitled by any provision of law in this State to any inquisition as to alleged insanity after sentence. Code, § 27-2601. Such investigation as may be made under the Code, § 27-2602, by a commission of physicians as may, in his discretion, be appointed by the Governor, arises out of a sense of public propriety and decency that one, though legally convicted and sentenced, should not suffer death during his mental incapacity to realize his situation and perhaps invoke some

remedial measure in his own behalf. The failure to accord such a person a judicial hearing and notice does not deprive him of due process of law under the State and Federal Constitutions.

2. The petition for habeas corpus showing that the petitioner had been convicted and sentenced to death for murder, and that the question of his alleged insanity after conviction and sentence had been investigated by a commission of three physicians chosen by the Governor under the provisions of the Code, § 27-2602, and that he had been found sane, but alleging that he was being detained by the Warden of the State Penitentiary for execution of his sentence in violation of the due-process clauses of the State and Federal Constitutions, in that he had not been accorded a judicial determination of his alleged insanity, did not set forth a cause of action, and the trial judge did not err in sustaining the general demurrer of the respondent and in dismissing the action and remanding the petitioner to the custody of the respondent.

[fol. 15] Statement of facts by Duckworth, Chief Justice.

George W. Solesbee filed in the Superior Court of Tattnall County, Georgia, on November 18, 1948, a habeas corpus petition against R. P. Balkcom Jr., alleging the following: The petitioner is incarcerated in the State penitentiary at Reidsville, Georgia, where he has been ordered put to death by electrocution on November 20, 1948, by R. P. Balkcom Jr., the warden of the said penitentiary, in pursuance of an order of the Honorable W. R. Smith, Judge of the Superior Courts of the Alapaha Circuit, presiding at Homerville, Clinch County, Georgia, on November 5, 1948. (It was alleged that the said order was without authority of law and in violation of named constitutional rights of the petitioner because entered during a respite granted by the Governor of the State suspending execution of a previous sentence until November 8, 1948, but it is admitted in this court that the question has become moot by reason of the fact that the sentence was not executed because of the filing of the habeas corpus proceeding and the order of the court restraining the said warden from proceeding with the execution until the further order of the court, and, accordingly, it is unnecessary to state such allegations.) It was alleged that the prisoner

was insane and can not be executed, and that, since there is no provision of law whereby the question of his sanity or insanity can be judicially determined, no sentence of death can be legally imposed upon him. "The only provision of law in the State of Georgia with reference to the manner in which one claims to have become insane subsequent to the entrance of a sentence of death is section 27-2602 of the Code of the State of Georgia, which is: '27-2602. (1074 P. C.). Disposition of insane convicts. Cost of investigations.—Upon satisfactory evidence being offered to the Governor that the person convicted of a capital offense has become insane subsequent to his conviction, the Governor may, within his discretion, have said person examined by such expert physicians as the Governor may choose, and said physicians shall report to the [fol. 16] Governor the result of their investigation; and the Governor may, if he shall determine that the person convicted has become insane, have the power of committing him to the Milledgeville State Hospital until his sanity shall have been restored, as determined by laws now in force. The cost of the investigation shall be paid by the Governor out of the contingent fund. (Acts 1903, p. 77.)' " The Code, § 27-2601, expressly prohibits anyone from having "an inquisition or trial to determine his sanity," the said section being as follows: "No person who has been convicted of a capital offense shall be entitled to any inquisition or trial to determine his sanity." To execute the petitioner without any judicial proceeding whereby and wherein he would be entitled to produce evidence as to his sanity and to be represented at a hearing for that purpose by counsel would be to deprive him of his life without notice or hearing and without any opportunity to obtain an original court hearing and adjudication of his sanity or to review the finding of any doctors' conclusions with reference thereto. Application was made to the Governor under the above section [§ 27-2602†] and three physicians were appointed to examine the petitioner, and they reported him sane, but the petitioner alleges that any inquisition which the Governor might set up under this section would be a mere matter of grace, and no order "passed as a matter of grace and not because of any provision of law would be in conflict with due-process clause of the Constitution of the State and of the Fourteenth Amendment of the Constitution of the United States" and

therefore void, and such has been declared to be the law in numerous instances.

It was prayed that the court grant the writ of habeas corpus requiring R. P. Balkcom Jr., Warden of the State Penitentiary at Reidsville, to produce the body of the petitioner on a date and time to be fixed by the court in order to determine the legality of his incarceration and the legality of the authority under which the said warden [fol. 17] purports to act under the said sentence, and also that the said warden be restrained from executing the petitioner until a hearing can be had on the petition.

The court entered an order granting the prayers of the petition, setting the hearing on November 27, 1948, at 11:30 a. m. at the courthouse in Ludowici, Long County, Georgia.

On the date set the warden produced the body of the petitioner and demurred to the petition on the following grounds: 1. No cause of action is set out in the petition. 2. (involving a question which has admittedly become moot, since the time set for the execution of the petitioner in the sentence of November 5, 1948, has passed, and a new date for his execution would have to be set). 3. There is no conflict between the two Code sections referred to in the petition. The method provided by law for inquiring into the sanity of a person already under sentence of death is not in violation of the Constitution of this State or of the United States, and the method provided for does not deprive a person of his life without due process of law.

The court sustained the demurrer and dismissed the action, on the ground that the Code, § 27-2602, affords due process of law to the petitioner, which redress is shown by the petition to have been afforded him, and the petitioner was remanded to the custody of the warden.

The exception here is to that judgment.

[fol. 18] Duckworth, Chief Justice. (After stating the foregoing facts.) The prisoner is shown by the petition to be under a sentence of death after conviction of murder, although the original date for electrocution was postponed by a respite granted by the Governor of the State. The life of the prisoner is by the conviction and sentence absolutely forfeited, and if execution takes place it will be in virtue of the original sentence. Baughn v. State, 100 Ga. 554, 559 (28 S. E. 68, L. R. A. 557); Mallory v. Chapman, 158 Ga. 228, 231 (122 S. E. 884); Gore v. Humphries, 163 Ga. 106,

111 (135 S. E. 481); Smith v. Henderson, 190 Ga. 886 (2) (10 S. E. 2d, 921); Fowler v. Grimes, 198 Ga. 84, 94 (31 S. E. 2d, 174).

The law affirmatively denies such person any right to demand an inquisition as to his insanity in such circumstances, it being declared by the Code, § 27-2601, that "No person who has been convicted of a capital offense shall be entitled to any inquisition or trial to determine his sanity." Speaking of the act from which this section was codified (Ga. L. 1903, p. 77), it was said in Lee v. State, 118 Ga. 764, 770 (45 S. E. 628): "Save as to pending cases, the connection of the courts with proceedings of this nature has thus been ended. This seems to be now the declared policy of the State, after experience had under the act of 1897." A stay of execution is not based on any inherent right of the prisoner. 14 Am. Jur. 804, § 48. Any investigation into his alleged insanity is in no sense a trial of the offense for which he was indicted and convicted, but arises out of a sense of public propriety and decency that one, though legally convicted and sentenced, should not suffer death during his mental incapacity to realize his situation and perhaps invoke some remedial measure in his own behalf. Spann v. State, 47 Ga. 549; Carr v. State, 98 Ga. 89 (27 S. E. 148); Baughn v. State, supra; 14 Am. Jur. 806, § 51. In keeping with this sense of propriety, it is provided in the Code, § 27-2602, that the Governor may, in his discretion, [fol. 19] have such person examined by such expert physicians as he may choose, and if he shall determine from the report of the physicians that the accused is insane, he shall have the power of committing him to the Milledgeville State Hospital until the restoration of his sanity. Under the Code, § 27-2603, providing for the reception into the State hospital of the prisoner, if found insane, it is stated that all the provisions of the law relating to insane persons under sentence of imprisonment in the penitentiary shall apply to such insane person as far as applicable. It is admitted in the petition for habeas corpus that such an examination as above referred to was made in the present case, and that the prisoner was found sane; but it is contended that such consideration shown the petitioner was merely an act of grace by the Governor and was not a substantial equivalent of due process of law which the petitioner is entitled to have granted him under some provision of law whereby his alleged insanity will be investigated

through mandatory judicial procedure, by notice and hearing, rather than by some commission of physicians which the Governor *may* in his discretion appoint. The procedure authorized for investigating the alleged insanity of the condemnee is, as properly termed by counsel for the petitioner, an act of grace, which, as hereinbefore shown, arises solely out of public propriety and decency. However, in the absence of statute, the prisoner has no right, even where an investigation is made, to have the question of his alleged insanity tried by a jury. 24 C. J. S. 202, § 1619; 14 Am. Jur. 807, § 53. Cases are cited by counsel to the effect that one entitled to notice and hearing is deprived of due process of law when such benefits are not afforded him. These are clearly distinguishable, in that here no right exists in the prisoner to any inquisition or trial. The due-process clause of the State and Federal Constitutions has no reference to mere concessions or privileges which may be bestowed or withheld by the State at will. Schlesinger v. Atlanta, 161 [fol. 20] Ga. 148 (129 S. E. 861); McKown v. Atlanta, 184 Ga. 221, 222 (3, 4) (190 S. E. 571). In Baughn v. State, supra, this court had under consideration § 1047 of the Code of 1895. That section provided for the summoning by the sheriff and ordinary of a jury to inquire into the alleged insanity of one who had been sentenced to death after conviction. It was held by this court that a refusal of a judge to enter upon a judicial investigation, as contended for by a friend on behalf of the prisoner, was not a denial of due process of law. In Nobles v. Georgia, 168 U. S. 398 (18 S. Ct. 87, 42 L. ed. 515), in affirming the judgment of this court, it was said: "Without analysis of the contention [that the condemnee was entitled to trial by jury in a judicial proceeding], it might well suffice to demonstrate its obvious unsoundness by pointing to the absurd conclusion which would result from its establishment. If it were true that at common law a suggestion of insanity after sentence created on the part of a convict an absolute right to a trial of this issue by a jury and a judge, then (as a finding that insanity did not exist at one time would not be the thing adjudged as to its non-existence at another) it would be wholly at the will of a convict to suffer any punishment whatever, for the necessity of his doing so would depend solely upon his fecundity in making suggestion after suggestion of insanity, to be followed by trial upon trial. . . . The question here is, what, after conviction and sentence,

was the method by which the existence of insanity in the convict was to be ascertained when a suggestion of such insanity was made." After quoting from certain authorities, the court concluded as follows: "It being demonstrated by reason and authority that at common law a suggestion made after verdict and sentence of insanity did not give rise to an absolute right on the part of a convict to have such issue tried before the court and to a jury, but addressed itself to the discretion of the judge, it follows that the manner in which such question should be determined *was purely* [fol. 21] *a matter of legislative regulation. It was, therefore, a subject within the control of the State of Georgia.*" (Italics ours.)

It follows that, having no right inherently or by statute in this State to a judicial investigation as to the alleged insanity of the prisoner, and no contention being made that he was not legally tried, convicted and sentenced, the prisoner is not being denied due process of law in being detained in the custody of the Warden of the State Penitentiary for electrocution on a new date to be set by reason of the respite which was granted by the Governor. Accordingly, the petition did not set forth a cause of action, and the trial judge did not err in sustaining the general demurrer of the respondent and in dismissing the action and remanding the prisoner to the custody of the respondent.

The cases cited by counsel for the petitioner have been carefully examined, but require no ruling different from that here made. Counsel particularly discuss Phyle v. Duffy, decided by the United States Supreme Court on June 7, 1948, and reported in advance sheets of 92 L. ed. 1107 and advance sheets of Supreme Court Reporter, Vol. 68, p. 1131. The opinion in that case, while making no ruling as to whether or not the condemned person had been denied due process of law, yet contains language which strongly indicates that the California law there involved must afford the condemned person a right to demand and obtain a judicial determination as to his sanity. It is provided in § 1367 of the Penal Code of California that "A person cannot be tried, adjudged to punishment, or punished for a public offense, while he is insane," and thereby an absolute right is conferred upon the condemned person. To protect this right the due-process clause of the Constitution may be invoked. But, as pointed out above, the State of Georgia not only does not confer such a right upon a condemned per-

son, but expressly declares that he has no such right (Code, § 27-2601), and gives the State the power to postpone his execution only when he has been found insane by the [fol. 22] procedure prescribed in the Code, § 27-2602. Thus is demonstrated the inapplicability to the present case of the rulings and intimations of the United States Supreme Court in the Phyle case.

Judgment affirmed. All the Justices concur.

[fol. 23] IN SUPREME COURT OF GEORGIA

GEORGE W. SOLESBEE

v.

R. P. BALKCOM, JR., Warden

JUDGMENT—March 14, 1949

This case came before this court upon a writ of error from the superior court of Tattnall county; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed. All the Justices concur.

[fol. 24] IN SUPREME COURT OF GEORGIA

No. 16537

SOLESBEE

v.

BALKCOM, JR., Warden

MOTION FOR REHEARING—Filed March 23, 1949

The Court having handed down a decision affirming the judgment in the above-stated case on the 14th day of March, 1949, now comes plaintiff in error and within the time allowed by law files this motion for a rehearing upon the following grounds:

1. Because the Court in the very opening paragraph of the opinion states, "the life of the prisoner is by the conviction and sentence absolutely forfeited, and if execution

takes place it will be by virtue of the original sentence," and then applied the principles ruled in Boughn v. State, 100 Ga. 554; Mallory v. Chapman, 158 Ga. 228; Gore v. Humphries, 163 Ga. 106; Smith v. Henderson, 190 Ga. 886; Fowler v. Grimes, 198 Ga. 84. And Movant says that in doing so the court evidently assumed that there had been an attack upon the sentence in this case, when as a matter of fact, there was no attack upon the sentence imposed. The sole question presented to the court was "Could the State of Georgia execute one whom it is alleged had become insane subsequent to his conviction and sentence, without some provision for a judicial determination of that question, without denying him due process of law under the 14th amendment of the Constitution of the United States." There was never any such question insisted upon and for the court to apply the principles of the decisions in the above stated cases was a misapplication of those principles to the question in this case and in doing so the court inadvertently overlooked that fact.

For instance, in the Boughn case, supra, there was no Federal Constitutional question as to the violation of the 14th amendment of the Constitution. Neither was such question raised in the Mallory case. The question there [fol. 25] was as to the validity as to an order fixing a new date, and in Gore v. Humphries the question turned upon the validity of the fixing of a new date for execution. And the same is true with reference to the question at issue in Smith v. Henderson, supra. Fowler v. Grimes, supra, also is an altogether different case from anything urged in the case sub judice. So we insist that the court inadvertently overlooked this fact when it applied the principles and ruled therein to the issues here presented. We also call attention to the fact that those cases were cases decided prior to the decision of the Supreme Court of the United States in the Phyle case, which is relied upon here.

There is no effort here to attack, by habeas corpus, the validity of the sentence. We are aware of the fact that that can not be done, neither is there an effort to compel the doing of anything, but to prohibit the execution of one alleged to have become insane subsequent to conviction.

2. Because the court ruled that a person alleged to have become insane subsequent to his sentence of death is by the law of Georgia "affirmatively" denied "an inquisition

as to his insanity in such circumstances" and applied the principles ruled in the case of Noble v. Georgia, 168 U. S. 398, quoting therefrom as follows: "Without analysis of the contention (that the condemnee was entitled to trial by jury in a judicial proceeding), it might well suffice to demonstrate its obvious unsoundness by pointing to the absurd conclusion which would result from its establishment. If it were true that at common law a suggestion of insanity after sentence, created on the part of a convict an absolute right to a trial of this issue by a jury and a judge, then (as a finding that insanity did not exist at one time would not be the thing adjudged as to its non-existence at another) it would be wholly at the will of a convict to suffer any punishment whatever, for the necessity of his doing so would depend solely upon his fecundity in making suggestion after suggestion of insanity, to be [fol. 26] followed by trial upon trial . . . The question here is, what, after conviction and sentence, was the method by which the existence of insanity in the convict was to be ascertained when a suggestion of such insanity was made. After quoting from certain authorities, the court concluded as follows: 'It being demonstrated by reason and authority that at common law a suggestion made after verdict and sentence of insanity did not give rise to an absolute right on the part of a convict to have such issue tried before the court and to a jury, but addressed itself to the discretion of the judge, it follows that the manner in which such question should be determined was purely a matter of legislative regulation. It was, therefore, a subject within the control of the State of Georgia.' "

It is respectfully insisted that in applying the decision as there rendered this court evidently overlooked the fact that the Act there being discussed was passed prior to the Act of 1903 from which Code sections 27-2601 and 27-2602 were codified; and the Act of 1903 expressly repealed the Act being discussed in that decision. And the ruling made in the Noble case is not the law at this date; and the court therefore inadvertently misapplied the ruling there made to the facts in this record. The State of Georgia had provided due process of law under the act under consideration then, while here the court holds expressly that the Georgia law denies one in plaintiff in error's situation any and all right to have his sanity judicially determined,

when such insanity is alleged to have arisen subsequent to his conviction and sentence.

3. Because the court in its ruling said, "The law affirmatively denies such person any right to demand an inquisition as to his insanity in such circumstances, it being declared by the Code, section 27-2601, that, 'No person who has been [fol. 27] convicted of a capital offense shall be entitled to any inquisition or trial to determine his sanity.' Speaking of the act from which this section was codified (Ga. L. 1903, p. 77), it was said in Lee v. State, 118 Ga. 764 (45 S. E. 628); 'Save as to pending cases, the connection of the courts with proceedings of this nature has thus been ended. This seems to be now the declared policy of the State, after experience had under the act of 1897.' A stay of execution is not based on any inherent right of the prisoner. 14 Am. Jur. 804, Section 48. Any investigation into his alleged insanity is in no sense a trial of the offense for which he was indicted and convicted, but arises out of a sense of public propriety and decency, that one, though legally convicted and sentenced, should not suffer death during his mental incapacity to realize his situation and perhaps invoke some remedial measure in his own behalf. Spann v. State, 47 Ga. 549; Carry v. State, 98 Ga. 89 (27 S. E. 148); Baughn v. State, supra; 14 Am. Jur. 806, section 51. In keeping with this sense of propriety it is provided in the Code, section 27-2602, that the Governor may, in his discretion, have such person examined by such expert physicians as he may choose, and if he shall determine from the report of the physicians that the accused is insane he shall have the power of committing him to the Milledgeville State Hospital until the restoration of his sanity. Under the Code, section 27-2603, providing for the reception into the State hospital of the prisoner, if found insane, it is stated that all the provisions of the law relating to insane persons under sentence of imprisonment in the penitentiary shall apply to such insane person as far as applicable," and in such ruling the court proceeds as if there was no attack upon the sections of the Code quoted, when, as a matter of [fol. 28] fact, it was those very sections that were being attacked as unconstitutional. And we respectfully insist that the court should have applied to them the yardstick of the 14th amendment of the Constitution of the United States.

4. Because it would seem that the court recognized the principles ruled in the Phyle case but refused to apply the same. And to refuse to apply the principles ruled therein to the State of Georgia is to set up one guarantee under the 14th amendment in one State, and deny its applicability in another State.

We respectfully submit that the court inadvertently fell into error in ruling that when a State enacts a rule with reference to when the question of insanity is to be determined that it "must afford the condemned person the right to demand and obtain a judicial determination as to his sanity," but when "the State of Georgia not only does not confer such a right upon a condemned person, but expressly declares no such right" exists, then Georgia is placed beyond the pale of any restraint under the 14th amendment of the Constitution of the United States. And we respectfully insist that the court has thus misapplied the 14th amendment of the Constitution of the United States.

5. It is further insisted that the court in holding that the procedure authorized for investigating the alleged insanity of the condemnee was properly termed by counsel for petitioner, an act of grace and when it reached that conclusion we respectfully insist, it inadvertently fell into error in refusing to apply the principles ruled in Stavens Lumber Co. v. Elliott, 134 Ga. 699, and the cases therein cited. And the court in so ruling, held in effect, that a negative act or no act at all exempts the State from the due process clause of the Constitution of the United States.

[fol. 29] 6. Because the court inadvertently overlooked Code Section 26-204, which provides that "An idiot is not to be found guilty or *punished for any crime or misdemeanor with which he may be charged.*" (Italics added.) Since in its decision on page 8 thereof, the court said: "It is provided in section 1367 of the Code of California that 'A person cannot be tried, adjudged to punishment, or punished for a public offense, while he is insane,' and thereby an absolute right is conferred upon the condemned person. To protect this right the due process clause of the Constitution may be invoked. But, as pointed out above, the State of Georgia not only does not confer such a right upon a condemned person, but expressly declares that he had no such right (Code, Section 27-2601), and give the State

the power to postpone his execution only when he has been found insane by the procedure prescribed in the Code, Section 27-2602. Thus is demonstrated the inapplicability to the present case of the rulings and intimations of the United State Supreme Court in the Phyle case." So we insist that the court overlooked the quoted sections of the Georgia Code as above set out, otherwise it would not have ruled as stated, as that section was to all intents and purposes similar to the section of the Code of California quoted.

7. We insist that this court in holding that sections 27-2601 and 27-2602 provides due process of law is to overlook the principles of law as laid down in Cooley's Constitutional Limitations, Chapter XI, page 353, where it is said, after citing the provisions of the several State Constitutions defining due process of law that: "No definition, perhaps, is more often quoted than that by Mr. Webster in the Dartmouth College case: 'By the law of the land is most clearly intended the general law, which hears before it condemns, which proceeds upon inquiry and renders judgment only [fol. 30] after trial. The meaning is, that every citizen shall hold his life, liberty, property, and immunities under the protection of general rules which govern society. Everything which may pass under the form of enactment is not the law of the land.'

"The definition here given is apt and suitable as applied to judicial proceedings, which cannot be valid unless they 'proceed upon inquiry,' and 'render judgment only after trial.' It is entirely correct, also, in assuming that a legislative enactment is not necessarily the law of the land. The words 'by the law of the land,' as used in the Constitution, do not mean a statute passed for the purpose of working the wrong. That construction would render the restriction absolutely nugatory, and turn this part of the Constitution into mere nonsense. The people would be made to say to the two houses: 'You shall be vested with the legislative power of the State, but no one shall be disfranchised or deprived of any of the rights or privileges of a citizen, unless you pass a statute for that purpose. In other words, you shall not do the wrong, unless you choose to do it.'"

8. The State can not act upon one of its subjects except when it does so, "according to pre-established regulations,"

because "Matter without form is chaos; power without form is anarchy. The State were it to disregard forms, would not be a government, but a mob. Its actions would not be administration, but violence. The public authority has a formal embodiment in the State, and when it moves, it moves as it has said by its laws it will move" (as said by Justice Bleckley in State v. Cochran, 62 Ga. 731). And those laws must conform to the 14th Amendment of the Constitution of the United States.

In conclusion we respectfully insist that grace can never be declared "due process of law." It is respectfully insisted that a rehearing should be granted.

Respectfully submitted, Benj. E. Pierce, Of Counsel for Plaintiff in Error.

[fol. 31] I, Benjamin E. Pierce, of Counsel for Plaintiff in error, hereby certify that I prepared the foregoing motion for rehearing and that I verily believe that the decision and facts referred to therein [sic] either inadvertently overlooked or misapplied as set out.

This 22 day of March, 1949.

Benj. E. Pierce, Of Counsel for Plaintiff in Error.

I, Benjamin E. Pierce, hereby certify that I am of counsel for George Solesbee, and that I mailed to the Honorable Eugene Cook, Attorney General for the State of Georgia, properly addressed and stamped, a copy of the within motion for a rehearing.

This 22nd day of March, 1949.

Benj. E. Pierce, Of Counsel for Movant.

[File endorsement omitted.]

[fol. 32] IN SUPREME COURT OF GEORGIA

George W. Solesbee v. R. P. Balkcom, Jr., warden.

ORDER DENYING MOTION FOR REHEARING—March 28, 1949

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

[fol. 33] SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR AN APPEAL—Filed April 18, 1949

To the Honorable W. H. Duckworth, Chief Justice of the Supreme Court of Georgia:

Appellant above named, considering himself aggrieved by the final decision of the Supreme Court of Georgia in rendering its decision against him in the above entitled cause, does here and now present this his petition for appeal, and prays that an appeal from said decision and judgment to the Supreme Court of the United States be allowed him.

This 18 day of April, 1949.

Benj. E. Pierce, Attorney for Appellant.

[fol. 34] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL—Filed April 18, 1949

The applicant in the above-entitled cause, having prayed for the allowance of an appeal to the Supreme Court of the United States from the judgment made and entered in the above entitled cause by the Supreme Court of the State of Georgia, on the 14th day of March, 1949, to which decision a motion for a rehearing was filed and overruled on 28th day of March, 1949, and from each and every part thereof, and having presented and filed his petition for appeal, assignment of errors, and prayer for reversal, pursuant to the statutes and rules of the Supreme Court

of the United States in such cases made and provided; It is, here and now, ordered that an appeal be, and the same is hereby allowed to the Supreme Court of the United States from the Supreme Court of the State of Georgia in the above entitled cause, as provided by law; and it is further ordered that the Clerk of the Supreme Court of the State of Georgia shall prepare and certify a transcript of the record, proceedings, and judgment in said cause, as specified in the Praecipe filed herewith, and cause the same to be transmitted to the Clerk of the Supreme Court of the United States, within forty (40) days from the date hereof.

This 18 day of April, 1949.

W. H. Duckworth, Chief Justice of the Supreme Court of Georgia.

[fol. 35] Citation in usual form showing service on Eugene Cook, filed April 18, 1949, omitted in printing.

[fol. 36] [File endorsement omitted.]

[fol. 37] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS—Filed April 18, 1949

To the Honorable W. H. Duckworth, Chief Justice of the Supreme Court of Georgia:

Now comes George W. Solesbee, Appellant in the above entitled cause (and pretermitting all State constitutional questions raised in the lower court), and files with his petition for appeal, the following assignment of errors upon the judgment of the Supreme Court of Georgia rendered in said cause:

1. Appellant filed a petition for habeas corpus before the Honorable Melvin Price, Judge of the Superior Court of the Atlantic Circuit in Georgia, alleging that he was about to be executed without due process of law in violation of the 14th Amendment of the Constitution of the United States. This petition was dismissed upon demurrer and

upon appeal to the Supreme Court of the State of Georgia, that judgment was sustained; that Court summerized the questions presented to it as follows,

"George W. Solesbee filed in the Superior Court of Tattnall County, Georgia, on November 18, 1948 a habeas corpus petition against R. P. Balkcom, Jr., alleging the following: The petitioner is incarcerated in the State penitentiary at Reidsville, Georgia, where he has been ordered put to death by electrocution on November 20, 1948, by R. P. Balkcom, Jr., the warden of the said penitentiary, in pursuance of an order of the Honorable W. R. Smith, judge of the Superior Court of the Alapaha Circuit, presiding at Homerville, Clinch County, Georgia, on November 5, 1948. (It was alleged [fol. 38] that the said order was without authority of law and in violation of named constitutional rights of the petitioner because entered during a respite granted by the Governor of the State suspending execution of a previous sentence until November 8, 1948, but it is admitted in this court that the question has become moot by reason of the fact that the sentence was not executed because of the filing of the habeas corpus proceeding and the order of the court restraining the said warden from proceeding with the execution until the further order of the court, and, accordingly, it is unnecessary to state such allegations.) It was alleged that the prisoner was insane and cannot be executed, and that since there is no provision of law whereby the question of his sanity or insanity can be judicially determined no sentence of death can be legally imposed upon him. 'The only provision of law in the State of Georgia with reference to the manner in which one claims to have become insane subsequent to the entrance of a sentence of death is Section 27-2602 of the Code of Georgia which is "Section 27-2602. (1074 P. C.) Disposition of insane convicts. Cost of investigations.—Upon satisfactory evidence being offered to the Governor that the person convicted of a capital offense has become insane subsequent to his conviction, the Governor may, within his discretion, have said person examined by such expert physicians as the Governor may choose; and said physicians shall report to the Governor the result of their investigation; and

the Governor may, if he shall determine that the person convicted has become insane, have the power of committing him to the Milledgeville State Hospital until his sanity shall have been restored, as determined by laws now in force. The cost of the investigation shall be paid by the Governor out of the contingent fund. (Acts 1903, p. 77.)'' '. The Code, Section 27-2601, expressly prohibits anyone from having 'an inquisition or trial to determine his sanity,' the said section being as follows: 'No person who has been convicted of a [fol. 39] capital offense shall be entitled to any inquisition or trial to determine his sanity.' To execute the petitioner without any judicial proceeding, whereby and wherein he would be entitled to produce evidence as to his sanity and to be represented at a hearing for that purpose by counsel would be to deprive him of his life without notice or hearing and without any opportunity to obtain an original court hearing and adjudication of his sanity or to review the finding of any doctors' conclusions with reference thereto. Application was made to the Governor under the above section (Section 27-2602?) and three physicians were appointed to examine the petitioner, and they reported him sane, but the petitioner alleges that any inquisition which the Governor might set up under this section would be a mere matter of grace, and no order 'passed as a matter of grace and not because of any provision of law would be in conflict with due process clause of the constitution of the State and of the fourteenth amendment of the constitution of the United States' and, therefore, void, and such has been declared to be the law in numerous instances.

"It was prayed that the court grant the writ of habeas corpus requiring R. B. Balkcom, Jr., warden of the State penitentiary at Reidsville, to produce the body of the petitioner on a date and time to be fixed by the court in order to determine the legality of his incarceration and the legality of the authority under which the said warden purports to act under the said sentence and also that the said warden be restrained from executing the petitioner until a hearing can be had on the petition.

"The court entered an order granting the prayers of the petition, setting the hearing for November 27,

1948, at 11:30 a.m. at the court house in Ludowici, Long County, Georgia.

"On the date set the warden produced the body of the petitioner and demurred to the petition on the following grounds: 1. No cause of action is set out in the [fol. 40] petition. 2. (Involving a question which has admittedly become moot, since the time set for the execution of the petitioner in the sentence of November 5, 1948, has passed, and a new date for his execution would have to be set.) 3. There is no conflict between the two Code sections referred to in the petition. The method provided by law for inquiring into the sanity of a person already under sentence of death is not in violation of the constitution of this State or of the United States, and the method provided for does not deprive a person of his life without due process of law.

"The court sustained the demurrer and dismissed the action, on the ground that the Code, Section 27-2602, affords due process of law to the petitioner, which redress is shown by the petition to have been afforded him, and the petitioner was remanded to the custody of the warden.

"The exception here is to that judgment."

The court divided its decision into two headnotes as follows,

"1. A stay of execution is not based on any inherent right of one who has been convicted and sentenced to suffer death for the offense of murder, and such person is not entitled by any provision of law in this State to any inquisition as to alleged insanity after sentence. Code, Sec. 27-2601. Such investigation as may be made under the Code, Sec. 27-2602, by a commission of physicians as may, in his discretion, be appointed by the Governor arises out of a sense of public propriety and decency that one, though legally convicted and sentenced, should not suffer death during his mental incapacity to realize his situation and perhaps invoke some remedial measure in his own behalf. The failure to accord such a person a judicial hearing and notice does not deprive him of due process of law under the State and Federal constitutions.

"2. The petition for habeas corpus showing that the petitioner had been convicted and sentenced to death [fol. 41] for the offense of murder, and that the question of his alleged insanity after conviction and sentence had been investigated by a commission of three physicians chosen by the Governor under the provisions of the Code, Sec. 27-2602, and that he had been found sane, but alleging that he was being detained by the warden of the State penitentiary for execution of his sentence in violation of the due process clauses of the State and Federal constitutions, in that he had not been accorded a judicial determination of his alleged insanity, did not set forth a cause of action, and the trial judge did not err in sustaining the general demurrer of the respondent and in dismissing the action and remanding the petitioner to the custody of the respondent."

And Appellant says that the Supreme Court erred in so ruling because the provisions of the Code of Georgia quoted in the decision of the Supreme Court which are Sections 27-2601 and 27-2602 do not provide due process of law as guaranteed by the 14th Amendment of the constitution of the United States. Since Section 27-2601 makes no mandatory provision requiring the Governor of the State of Georgia to set up a commission to determine whether or not one who it was alleged had become insane subsequent to his conviction was sane or insane, but leaves it wholly within the Governor's discretion whether he will act at all. And section 27-2602 lays down no rules to guide such commission in its investigation. It makes no provision whereby Appellant could have appeared, either by Counsel or in person or permit him to introduce any evidence before such commission as to whether or not he was sane or insane, neither were the members of such commission required to take any oath, but they were left absolutely to their own discretion in such matters. And Appellant says that this does not provide due process of law as guaranteed under the 14th Amendment of the Constitution of the United States, but on the contrary expressly denied Appellant rights guaranteed thereunder.

2. Because the Supreme Court of Georgia failed and refused to follow the principles ruled by this Court in the

[fol. 42] case of Phyle vs. Duffie, decided June 7, 1948, and reported in 92 Law Edition Advance Opinions of this Court on page 1107.

3. Because the Court in the very opening paragraph of its opinion states, "The life of the prisoner is by the conviction and sentence absolutely forfeited", and then proceeds to hold that Appellant had no other rights arising after conviction, to have his sanity inquired into, even if it intervened after conviction, by some judicial method, and to execute him would be to do so without due process of law in violation of the 14th Amendment of the Constitution of the United States and appellant says such ruling was error, because when the Supreme Court of Georgia found that the law of the State of Georgia "affirmatively" denied "an inquisition as to his sanity in such circumstances" such ruling was directly in conflict with the provisions of the 14th Amendment of the Constitution of the United States and of the decision of this Court in the Phyle case.

4. Because when the Supreme Court of Georgia held the law to be as stated in its decision that "the law affirmatively denies such person any right to demand an inquisition as to his insanity in such circumstances, it being declared that, 'No person who has been convicted of a capital offense shall be entitled to any inquisition or trial to determine his sanity.' Speaking of the act from which this section was codified (Ga. L. 1903, p. 77), it was said in Lee v. State, 118 Ga. 764 (45 S.E. 628); 'Save as to pending cases, the connection of the courts with proceedings of this nature has thus been ended. This seems to be now the declared policy of the State, after experience had under the act of 1897.' A stay of execution is not based on any inherent right of the prisoner. 14 Am. Jur. 804, Section 48. Any investigation into his alleged insanity is in no sense a trial of the offense for which he was indicted and convicted, but arises out of a sense of public propriety and decency, that one, though legally convicted and sentenced, should not suffer death during his mental incapacity to realize his situation and perhaps invoke some remedial measure in his own behalf. Spann v. State 47 Ga. 549; Carr v. State, 98 Ga. 89 (27 S.E. 148); Baughn v. State, supra; 14 Am. Jur. 806, [fol. 43] Section 51. In keeping with this sense of propriety it is provided in the Code, Section 27-2602, that the Gov-

ernor may, in his discretion, have such person examined by such expert physicians as he may choose, and if he shall determine from the report of the physicians that the accused is insane he shall have the power of committing him to the Milledgeville State Hospital until the restoration of his sanity. Under the Code, Section 27-2603, providing for the reception into the State hospital of the prisoner, if found insane, it is stated that all the provisions of the law relating to insane persons under sentence of imprisonment in the penitentiary shall apply to such insane person as far as applicable."

It should have then held that these provisions of the law of Georgia denied Appellant due process of law under the 14th Amendment of the Constitution of the United States and it was error not to so hold.

5. Because the Supreme Court of Georgia recognized the principles ruled in the Phyle case but refused to apply the same to the law of the State of Georgia, and the acts of one of its public officers, was tantamount to setting up a different rule governing in Georgia than that governing in all the other states of the Union, and its error is demonstrated by this statement of the Court, after reciting that, when a State does enact a rule with reference to how the question of insanity is to be determined it, "must afford the condemned person the right to demand and obtain a judicial determination as to his sanity", but when "the State of Georgia not only does not confer such a right upon a condemned person, but expressly declares no such right" exists, then Georgia is placed beyond the pale of any restraint under the 14th Amendment of the Constitution of the United States.

6. Because the Supreme Court of Georgia while discussing the provisions of the Code of the State of California, overlooked section 26-204 of the Code of Georgia which declared "an idiot is not to be found guilty or punished for any crime or misdemeanor with which he may be charged", since on page 8 of its decision the Georgia Supreme Court [fol. 44] held "It is provided in section 1367 of the Code of California that 'A person cannot be tried, adjudged to punishment, or punished for a public offense, while he is insane,' and thereby an absolute right is conferred upon the condemned person. To protect this right the due process clause of the Constitution may be invoked. But,

as pointed out above, the State of Georgia not only does not confer such a right upon a condemned person, but expressly declares that he had no such right (Code, Section 27-2601), and gives the State the power to postpone his execution only when he has been found insane by the procedure prescribed in the Code, Section 27-2602. Thus is demonstrated the inapplicability to the present case of the rulings and intimations of the United States Supreme Court in the Phyle case."

7. And in so holding the Supreme Court of Georgia erred.

Wherefore, Appellant prays that the judgment of the Supreme Court of the State of Georgia be reversed.

Benj. E. Pierce, Attorney for Appellant.
Post Office Address: Augusta, Georgia.

The foregoing assignment of errors is hereby approved and ordered filed as a part of the record in said case.
This 18 day of April, 1949.

W. H. Duckworth, Chief Justice, Supreme Court of Georgia.

Due and legal service of a copy of the above and foregoing assignment of errors is hereby acknowledged.
This 18 day of April, 1949.

Eugene Cook, Attorney General, Marten H. Peabody, Assistant Attorney General.
Post Office Address: Reidsville, Georgia.

[fol. 45] [File endorsement omitted]

[fols. 46-72] Copy acknowledged, Eugene Cook, Attorney General; M. H. Peabody, Assistant Atty. Gen.

[fol. 73] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 74] SUPREME COURT OF THE UNITED STATES

ORDER NOTING PROBABLE JURISDICTION—June 6, 1949

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

[fol. 75] SUPREME COURT OF THE UNITED STATES

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS—June 6, 1949

On Consideration of the motion for leave to proceed herein *in forma pauperis*,

It is Ordered by this Court that the said motion be, and the same is hereby, granted.

[fol. 76] IN THE SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON—Filed June 16, 1949

The point relied upon for a reversal in the above stated case, is because it is contended that Appellant is about to be executed without due process of law, in violation of the 14th Amendment of the Constitution of the United States, which provides in part, as follows:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The point arises as follows: Appellant was convicted of murder in the Superior Court of Clinch County, Georgia, and sentenced to death by electrocution. He thereupon appealed to the Supreme Court of Georgia, and that Court affirmed the judgment of the lower Court. Thereafter, another date was fixed for his execution, whereupon he filed a petition for habeas corpus, alleging that he was insane, and that such insanity had intervened since his conviction and sentence to death; that under the law of Georgia there was no method whereby he could have the question of his sanity judicially determined; that the only method that was provided by Georgia law was for one in appellant's situation to bring such condition to the attention of the Governor of the State as provided in Section 27-2601 of the Code, to wit:

> "27-2601. (1073 P. C.) No Inquisition After Capital Conviction.—No person who has been convicted of a

capital offense shall be entitled to any inquisition or [fol. 77] trial to determine his sanity. (Acts 1903, p. 77)."

And that Section left it to the absolute discretion of the Governor as a matter of grace, whether he would appoint a commission to investigate the question of insanity in the first place, and that such section made no provision for one in Appellant's situation to compel the Governor to act; that Section 27-2602 of the Code provides as follows:

"27-2602. (1074 P. C.) Disposition of Insane Convicts. Cost of Investigations.—Upon satisfactory evidence being offered to the Governor that the person convicted of a capital offense has become insane subsequent to his conviction, the Governor may, within his discretion, have said person examined by such expert physicians as the Governor may choose; and said physicians shall report to the Governor the result of their investigation; and the Governor may, if he shall, determine that the person convicted has become insane, have the power of committing him to the Milledgeville State Hospital until his sanity shall have been restored, as determined by laws now in force. The cost of the investigation shall be paid by the Governor out of the contingent fund. (Acts 1903, p. 77.)";

that under this Section there was no provision for the swearing of the physicians constituting such commission, nor any provision whereby applicant could be heard either through himself or through an Attorney at Law, nor to present any evidence as to the question of sanity or insanity; and therefore such sections of the Code were unconstitutional, and in violation of the 14th Amendment of the Constitution of the United States; and to execute appellant would be to deny him due process of law.

[fol. 78] To the petition for habeas corpus the Respondent demurred upon the ground that the petition for habeas corpus set out no cause of action, and the Court thereupon sustained such demurrer upon the ground that the Sections of the Code above quoted provided due process of law, and then dismissed the petition on demurrer and discharged the writ.

That judgment was appealed to the Supreme Court of the State of Georgia, which is the highest Court in the State where it was affirmed. A copy of such decision is attached as Exhibit "A" to the Statement of Jurisdictional Points and Brief thereon. So, we rely upon the 14th Amendment of the Constitution of the United States, and upon the principle ruled in the case of William Jerome Phyle vs. Clinton T. Duffy, Warden of the State Prison at San Quentin, State of California, decided June 7, 1948 and reported in United States Supreme Court Advanced Sheets published by the Lawyers Cooperative Publishing Co. in Vol. 92-No. 18, at page 1107, etc.

So the point to be decided is whether or not to execute Appellant under the circumstances as shown by the record in this Court, would not be in violation of his rights as guaranteed under the 14th Amendment of the Constitution of the United States.

Respectfully, Benj. E. Pierce, Attorney for Appellant.

[fol. 79] Due and legal service of a copy of the foregoing point upon which the Appellant in the stated case will rely for a reversal of the judgment of the Supreme Court of Georgia, is hereby acknowledged. All further service and notice are hereby waived.

This 15 day of June, 1949.

Eugene Cook, Claude Shaw, Attorney General of Georgia.

[fol. 80] IN THE SUPREME COURT OF THE UNITED STATES

DESIGNATION OF PARTS OF RECORD TO BE PRINTED—Filed June 16, 1949

Now comes Benj. E. Pierce, Attorney for Appellant in the above stated case, and designates the following parts of the record to be printed:

1. The transcript of the record in the lower court, as transmitted by the Clerk of the Supreme Court of Georgia.
2. The decision of the Supreme Court of Georgia.
3. The motion for rehearing in that Court, and judgment thereon.
4. Petition for appeal.

5. Order allowing appeal.

6. Citation and acknowledgment thereon.

7. Assignment of errors.

8. Statement of Jurisdictional Points and Brief thereon.

9. Notice to R. P. Balkcom, Jr., Warden, Appellee, and acknowledgment thereon.

10. Notice to Eugene Cook, Attorney General of Georgia, and acknowledgment thereon.

11. Points on which Appellant relies for a reversal of the decision of the Supreme Court of Georgia (omitting all formal parts or duplications as in the discretion of the Clerk should be omitted).

Respectfully, Benj. E. Pierce, Attorney for Appellant.

[fol. 81] Due and legal service of a copy of the foregoing designation of the parts of the record to be printed in the stated case, is hereby acknowledged.

This 15 day of June, 1949.

Eugene Cook, Claude Shaw, Attorney General of Georgia.

[fol. 81a] [File endorsement omitted]

Endorsed on Cover: In forma pauperis. Enter Benjamin E. Pierce. File No. 53,808 Georgia, Supreme Court. Term No. 806. George W. Solesbee, Appellant, vs. R. P. Balkcom, Jr., Warden of the State Penitentiary, Tattnall, Georgia. Filed May 23, 1949. Term No. 806 O. T. 1948.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 77

GEORGE W. SOLESBEE,

Appellant,

vs.

R. P. BALKCOM, JR., WARDEN OF THE STATE PENITENTIARY, TATTNALL, GEORGIA

APPEAL FROM THE SUPREME COURT OF THE STATE OF GEORGIA

APPELLANT'S BRIEF

BENJ. E. PIERCE,
Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 77

GEORGE W. SOLESBEE,

Appellant,

vs.

R. P. BALKCOM, JR., WARDEN OF THE STATE PENITENTIARY, TATTNALL, GEORGIA

Appellee

APPEAL FROM THE SUPREME COURT OF GEORGIA

APPELLANT'S BRIEF

BRIEF OF BENJAMIN E. PIERCE, ATTORNEY FOR APPELLANT, IN COMPLIANCE WITH RULE 27 OF THIS COURT

(b)

The case appealed from has not yet been printed in the official reports of the Supreme Court of Georgia, but a copy of the same, together with a motion for rehearing and judgment thereon, is printed in the Record, pages 9-22. It has been published however in 52 (2d) Southeastern Reporter, page 433.

(c)

The ground upon which the jurisdiction of this Court is invoked is that Appellant is about to be executed without due process of law, in violation of the 14th Amendment of the Constitution of the United States, which provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

(d)

Statement of the Case

Appellant filed a petition for habeas corpus before the Honorable Melvin Price, Judge of the Superior Courts of the Atlantic Circuit in Georgia, alleging that he was about to be executed without due process of law in violation of the 14th Amendment of the Constitution of the United States. This petition was dismissed upon demurrer and upon appeal to the Supreme Court of the State of Georgia, that judgment was sustained; that Court summarized the questions presented to it (Record, pages 10-12) as follows:

> "George W. Solesbee filed in the Superior Court of Tattnall County, Georgia, on November 18, 1948, a habeas corpus petition against R. P. Balkcom, Jr., alleging the following: The petitioner is incarcerated in the State penitentiary at Reidsville, Georgia, where he has been ordered put to death by electrocution on November 20, 1948, by R. P. Balkcom, Jr., the warden of the said penitentiary, in pursuance of an order of the Honorable W. R. Smith, Judge of the Superior Courts of the Alapaha Circuit, presiding at Homerville, Clinch

County, Georgia, on November 5, 1948. (It was alleged that the said order was without authority of law and in violation of named constitutional rights of the petitioner because entered during a respite granted by the Governor of the State suspending execution of a previous sentence until November 8, 1948, but it is admitted in this court that the question has become moot by reason of the fact that the sentence was not executed because of the filing of the habeas corpus proceeding and the order of the court restraining the said warden from proceeding with the execution until the further order of the court, and, accordingly, it is unnecessary to state such allegations.) It was alleged that the prisoner was insane and cannot be executed, and that, since there is no provision of law whereby the question of his sanity or insanity can be judicially determined, no sentence of death can be legally imposed upon him. 'The only provision of law in the State of Georgia with reference to the manner in which one claims to have become insane subsequent to the entrance of a sentence of death is section 27-2602 of the Code of the State of Georgia, which is: "27-2602. (1074 P. C.). Disposition of insane convicts. Cost of investigations. —Upon satisfactory evidence being offered to the Governor that the person convicted of a capital offense has become insane subsequent to his conviction, the Governor may, within his discretion, have said person examined by such expert physicians as the Governor may choose, and said physicians shall report to the Governor the result of their investigation; and the Governor may, if he shall determine that the person convicted has become insane, have the power of committing him to the Milledgeville State Hospital until his sanity shall have been restored, as determined by laws now in force. The cost of the investigation shall be paid by the Governor out of the contingent fund. (Acts 1903, p. 77.)"' The Code, Sec. 27-2601, expressly prohibits anyone from having 'an inquisition or trial to determine his sanity,' the said section being as follows: 'No person who has been convicted of a capital offense shall be entitled to any inquisition or

trial to determine his sanity.' To execute the petitioner without any judicial proceeding whereby and wherein he would be entitled to produce evidence as to his sanity and to be represented at a hearing for that purpose by counsel would be to deprive him of his life without notice or hearing and without any opportunity to obtain an original court hearing and adjudication of his sanity or to review the finding of any doctors' conclusions with reference thereto. Application was made to the Governor under the above section (27-2602) and three physicians were appointed to examine the petitioner, and they reported him sane, but the petitioner alleges that any inquisition which the Governor might set up under this section would be a mere matter of grace, and no order 'passed as a matter of grace and not because of any provision of law would be in conflict with due-process clause of the Constitution of the State and of the Fourteenth Amendment of the Constitution of the United States'-and therefore void, and such has been declared to be the law in numerous instances.

"It was prayed that the court grant the writ of habeas corpus requiring R. P. Balkcom, Jr., Warden of the State Penitentiary at Reidsville, to produce the body of the petitioner on a date and time to be fixed by the court in order to determine the legality of his incarceration and the legality of the authority under which the said warden purports to act under the said sentence, and also that the said warden be restrained from executing the petitioner until a hearing can be had on the petition.

"The court entered an order granting the prayers of the petition, setting the hearing on November 27, 1948, at 11:30 A. M. at the courthouse in Ludowici, Long County, Georgia.

"On the date set the warden produced the body of the petitioner and demurred to the petition on the following grounds: 1. No cause of action is set out in the petition. 2. (involving a question which has admittedly become moot, since the time set for the execution

of the petitioner in the sentence of November 5, 1948, has passed, and a new date for his execution would have to be set). 3. There is no conflict between the two Code sections referred to in the petition. The method provided by law for inquiring into the sanity of a person already under sentence of death is not in violation of the Constitution of this State or of the United States, and the method provided for does not deprive a person of his life without due process of law.

"The court sustained the demurrer and dismissed the action, on the ground that the Code, Section 27-2602, affords due process of law to the petitioner, which redress is shown by the petition to have been afforded him, and the petitioner was remanded to the custody of the warden."

The exception here is to that judgment.

(e)

A specification of the assigned errors as are intended to be argued are as follows:

1. The Supreme Court of Georgia divided its decision into two headnotes, to wit:

"1. A stay of execution is not based on any inherent right of one who has been convicted and sentenced to suffer death for the offense of murder, and such person is not entitled by any provision of law in this State to any inquisition as to alleged insanity after sentence. Code, Sec. 27-2601. Such investigation as may be made under the Code, Sec. 27-2602, by a commission of physicians as may, in his discretion, be appointed by the Governor arises out of a sense of public propriety and decency that one, though legally convicted and sentenced, should not suffer death during his mental incapacity to realize his situation and perhaps invoke some remedial measure in his own behalf. The failure to accord such a person a judicial hearing and notice does not deprive him of due process of law under the State and Federal constitutions.

"2. The petition for habeas corpus showing that the petitioner had been convicted and sentenced to death for the offense of murder, and that the question of his alleged insanity after conviction and sentence had been investigated by a commission of three physicians, chosen by the Governor under the provisions of the Code, Sec. 27-2602, and that he had been found sane, but alleging that he was being detained by the warden of the State Penitentiary for execution of his sentence in violation of the due process clauses of the State and Federal constitutions, in that he had not been accorded a judicial determination of his alleged insanity, did not set forth a cause of action, and the trial judge did not err in sustaining the general demurrer of the respondent and in dismissing the action and remanding the petitioner to the custody of the respondent."

And appellant says that the Supreme Court erred in so ruling because the provisions of the Code of Georgia quoted in the decision of the Supreme Court which are Sections 27-2601 and 27-2602 do not provide due process of law as guaranteed by the 14th Amendment of the Constitution of the United States. Since Section 27-2601 makes no mandatory provision requiring the Governor of the State of Georgia to set up a commission to determine whether or not one who it was alleged had become insane subsequent to his conviction was sane or insane, but leaves it wholly within the Governor's discretion whether he will act at all. And Section 27-2602 lays down no rules to guide such commission in its investigation. It makes no provision whereby Appellant could have appeared, either by Counsel or in person or permit him to introduce any evidence before such commission as to whether or not he was sane or insane, neither were the members of such commission required to take any oath, but they were left absolutely to their own discretion in such matters. And Appellant says that this

does not provide due process of law as guaranteed under the 14th Amendment of the Constitution of the United States, but on the contrary expressly denied Appellant rights guaranteed thereunder.

(2) Because the Supreme Court of Georgia failed and refused to follow the principles ruled by this Court in the case of *Phyle* v. *Duffy*, decided June 7, 1948, reported in 334 U. S., 431-5, 92 L. Ed., 1492.

(3) Because the Court in the very opening paragraph of its opinion stated, "The life of the prisoner is by the conviction and sentence absolutely forfeited", and then proceeds to hold that Appellant had no other rights arising after conviction, to have his sanity inquired into, even if it intervened after conviction, by some judicial method, and to execute him would be to do so without due process of law in violation of the 14th Amendment of the Constitution of the United States and appellant says such ruling was error, because when the Supreme Court of Georgia found that the law of the State of Georgia "affirmatively" denied "an inquisition as to his sanity in such circumstances" such ruling was directly in conflict with the provisions of the 14th Amendment of the Constitution of the United States and of the decision of this Court in the *Phyle* case.

(4) Because when the Supreme Court of Georgia held the law to be as stated in its decision that "the law affirmatively denies such person any right to demand an inquisition as to his insanity in such circumstances, it being declared that, 'No person who has been convicted of a capital offense shall be entitled to any inquisition or trial to determine his sanity.' Speaking of the act from which this section was codified (Ga. L. 1903, p. 77), it was said in Lee *v.* State, 118 Ga. 764 (45 S. E. 628): 'Save as to pending cases, the connection of the courts with proceedings of

this nature has thus been ended. This seems to be now the declared policy of the State, after experience had under the act of 1897.' A stay of execution is not based on any inherent right of the prisoner. 14 Am. Jur. 804, Section 48. Any investigation into his alleged insanity is in no sense a trial of the offense for which he was indicted and convicted, but arises out of a sense of public propriety and decency, that one, though legally convicted and sentenced, should not suffer death during his mental incapacity to realize his situation and perhaps invoke some remedial measure in his own behalf. Spann *v.* State, 47 Ga. 549; Carr *v.* State, 98 Ga. 89 (27 S. E. 148); Baughn *v.* State, supra; 14 Am. Jur. 806, Section 51. In keeping with this sense of propriety it is provided in the Code, Section 27-2602, that the Governor, may, in his discretion, have such person examined by such expert physicians as he may choose, and if he shall determine from the report of the physicians that the accused is insane he shall have the power of committing him to the Milledgeville State Hospital until the restoration of his sanity. Under the Code, Section 27-2603, providing for the reception into the State hospital of the prisoner, if found insane, it is stated that all the provisions of the law relating to insane persons under sentence of imprisonment in the penitentiary shall apply to such insane person as far as applicable."

It should have then held that these provisions of the law of Georgia denied Appellant due process of law under the 14th Amendment of the Constitution of the United States and it was error not to so hold.

(5) Because the Supreme Court of Georgia recognized the principles ruled in the *Phyle* case but refused to apply the same to the law of the State of Georgia; and the acts of one of its public officers, was tantamount to setting up a different rule governing in Georgia than that governing

in all the other States of the Union, and its error is demonstrated by this statement of the Court, after reciting that, when a State does enact a rule with reference to how the question of insanity is to be determined it, "must afford the condemned person the right to demand and obtain a judicial determination as to his sanity", but when "the State of Georgia not only does not confer such a right upon a condemned person, but expressly declares no such right" exists, then Georgia is placed beyond the pale of any restraint under the 14th Amendment of the Constitution of the United States.

(6) Because the Supreme Court of Georgia while discussing the provisions of the Code of the State of California, overlooked section 26-204 of the Code of Georgia which declared "an idiot is not to be found guilty or punished for any crime or misdemeanor with which he may be charged," since on page 8 of its decision the Georgia Supreme Court held "It is provided in section 1367 of the Code of California that 'A person cannot be tried, adjudged to punishment, or punished for a public offense, while he is insane,' and thereby an absolute right is conferred upon the condemned person. To protect this right the due process clause of the Constitution may be invoked. But, as pointed out above, the State of Georgia not only does not confer such a right upon a condemned person, but expressly declares that he had no such right (Code Section 27-2601), and gives the State the power to postpone his execution only when he has been found insane by the procedure prescribed in the Code, Section 27-2602. Thus is demonstrated the inapplicability to the present case of the rulings and intimations of the United States Supreme Court in the *Phyle* case."

(7) And in so holding the Supreme Court of Georgia erred.

(Epitomized in statement of points to be relied upon—Record page 32.)

Argument and Authorities

From the foregoing it will be seen that the whole case is grounded upon guarantees under the 14th Amendment of the Constitution of the United States, as interpreted by numerous decisions of this Court; and especially in the case of *Phyle* v. *Duffy*, decided June 7, 1948, reported in 334 U. S. 431-45, 92 L. Ed. 1492, a summary of which is as follows:

> "One under sentence of death who, after having been judicially determined to be insane, was declared to be sane by a state doctor, without notice or hearing and without opportunity to obtain a court hearing or judicial review, unsuccessfully sought, by petition for habeas corpus in a state court, to obtain adjudication of his claim that he was insane and therefore entitled to the benefit of a statute prohibiting punishment of a person while insane for a public offense. Under the law of the state, one under sentence of death may obtain a judicial determination of insanity only in proceedings initiated by the act of the prison warden in calling to the attention of the district attorney the fact that there is good reason to believe that the prisoner has become insane.
>
> "The Supreme Court, in an opinion by Black, J., in which four other Justices joined, accepted the contention that the prisoner had a remedy under state law by mandamus proceedings to compel the warden to act, in which the court would determine whether upon the evidence there is reason to believe the prisoner insane, and accordingly held that as the state court's denial of habeas corpus may have rested upon the adequate non-Federal ground that his remedy was by mandamus, the due process questions raised by him were not ripe for decision.
>
> "Frankfurter, J., with whom Douglas, Murphy and Rutledge, JJ., joined, delivered a concurring opinion

with a view to making clear that the Court's refusal to consider the constitutional issues is contingent upon a determination by the state court that the law of the state is what the United States Supreme Court presupposes, namely, that state law affords a remedy whereby the convicted person may secure a judicial determination of his present sanity."

The Supreme Court of the State of Georgia stated the issues crystal clear, met them head on, and literally tossed them out of the window (Record, page 10). We insist that no clearer denial of a constitutional right can be found in the books. It is insisted that the record in this case makes a much stronger case than the record in the *Phyle* case. Here the highest Court of the State of Georgia in no uncertain terms, held:

"1. A stay of execution is not based on any inherent right of one who has been convicted and sentenced to suffer death for the offense of murder, and such person is not entitled by any provision of law in this State to any inquisition as to alleged insanity after sentence. Code, Section 27-2601. Such investigation as may be made under the Code, Section 27-2602, by a commission of physicians as may, in his discretion, be appointed by the Governor, arises out of a sense of public propriety and decency that one, though legally convicted and sentenced, should not suffer death during his mental incapacity to realize his situation and perhaps invoke some remedial measure in his own behalf. The failure to accord such a person a judicial hearing and notice does not deprive him of due process of law under the State and Federal Constitutions.

"2. The petition for habeas corpus showing that the petitioner had been convicted and sentenced to death for murder, and that the question of his alleged insanity after conviction and sentence had been investigated by a commission of three physicians chosen by the Governor under the provisions of the Code, Section 27-2602, and that he had been found sane, but alleging that he

was being detained by the Warden of the State Penitentiary for execution of his sentence in violation of the due-process clauses of the State and Federal Constitutions, in that he had not been accorded a judicial determination of his alleged insanity, did not set forth a cause of action, and the trial judge did not err in sustaining the general demurrer of the respondent and in dismissing the action and remanding the petitioner to the custody of the respondent."

The Georgia Supreme Court placed a great deal of store by the case of *Nobles* v. *Georgia*, 168 U. S. 398, cited and discussed by this Court in *Phyle* v. *Duffy* (Record, page 14), but we respectfully insist that that case was decided in 1897, when the Georgia law was to the effect, as stated by the United States Supreme Court, as follows:

"The Georgia law under scrutiny in the Nobles case provided that the sanity of a person previously condemned to death should be determined by a tribunal formed in the following manner: 'The sheriff of the county, with the concurrence and assistance of the Ordinary thereof, *shall* summon a jury of twelve men to inquire into such sanity. . . .' If this tribunal found insanity the sheriff was required to suspend execution of sentence and report his action to the presiding judge." (Emphasis added.)

Now the law in effect when the *Nobles* case was decided was repealed by the Act of 1903 from which Act, Sections 27-2601 and 27-2602, were codified.

In *Cribb* v. *Parker*, 119 Ga., 298 (1, 2 and 3), the Supreme Court held:

"1. Penal Code, Sec. 1047, as amended by the Act of December 21, 1897 (Acts 1897, p. 41, Van Epps' Code Supp. Sec. 6757), was repealed by the Act of August 17, 1903, (Acts 1903, p. 77), providing for the abolition of trials or inquisitions, after conviction, as to the sanity of persons accused of capital offenses.

"2. The third section of the repealing act, which provided that that act 'shall not apply to any pending case,' has application only to inquisition of insanity pending under the act of 1897.

"3. After the date of the passage of the repealing act a judge of the superior court had no jurisdiction to entertain an original application for an inquisition of insanity under the act of 1897, or to grant an order suspending the sentence in the case."

So this being true the principles underlying the ruling in the *Phyle* case stand out in bold relief in substantiation of our position. In other words, Sections 27-2601 and 27-2602 put into the unbridled discretion of one man as to when one might have his sanity inquired into. And we insist that life should "not be taken by a State as the result of the unreviewable *ex parte* determination of a crucial fact made by a single executive officer," as said by the Supreme Court of the United States in the *Phyle* case.

In that case the Attorney General of California asserted that under the law of California the plaintiff there had a State remedy by mandamus to compel the Warden of the Penitentiary to empanel a jury to try the question of sanity which statement the Supreme Court of the United States accepted. Here, the Supreme Court of Georgia has held that there is no redress under the Georgia Law for one in plaintiff's plight.

Again the Supreme Court of Georgia seemed to bank a great deal on the fact that the State of California in the *Phyle* case cited a statute that "A person cannot be tried, adjudicated to punishment, or punished for a public offense while he is insane," (Record, page 20), but completely overlooked Sec. 26-204 of the Code of Georgia which provides that:

"An idiot is not to be found guilty or punished for any crime or misdemeanor for which he may be charged."

So, the distinction drawn, we respectfully insist is one without difference insofar as constitutional rights are concerned. (See Record, page 20 (6)). We realize that there may be some difference between "idiot" and "insane," but in reality, not insofar as the humanity of the law is concerned. But regardless of this, there "arises out of the sense of public propriety and decency, that one, though legally convicted and sentenced should not suffer death during his mental incapacity to realize his situation and perhaps invoke some remedial measure in his own behalf," as stated by the Georgia Supreme Court in its decision, but it goes on to hold that Sections 27-2601, 27-2602, etc. prescribe due process of law under the 14th Amendment of the Constitution of the United States, and therein lies "the heart of (Appellant's) charge—that he" has been denied due process of law.

It is ruled by the Supreme Court of Georgia that all appellant was entitled to was a matter of grace. That Court said—(Record, top of page 14):

> "The procedure authorized for investigating the alleged insanity of the condemnee is, as properly termed by Counsel for the petitioner, an *act of grace*, which, as hereinbefore shown, arises solely out of public propriety and decency." (Emphasis added.)

We insist that "grace" is no due process of law, as defined by the Courts.

Central of Georgia Railroad Company vs. *Wright*, 207 U. S., 127, 52 L. Ed. 134.

Security Trust and Vault Company vs. *City of Lexington*, 203 U. S., 323, 51 L. Ed., 204.

Shippen Lumber Co. v. *Elliott*, 134 Ga., 699.

Piggly-Wiggly Co. Co. v. *May Investing Cor.*, 189 Ga., 481.

In the brief for Respondent, it is stated:

> "The appellant contends that he is being deprived of his Constitutional rights because there is no provision of Georgia Law *under which he may appeal from the decision of the Commission appointed by the Governor to examine into his sanity.* (Emphasis added.) The State of Georgia submits that there is no merit to this contention since the law of Georgia makes no provision for such appeal. No person who has been convicted of a capital offense shall be entitled to any inquisition or trial to determine his sanity.
>
> "The appellant contends that the Commission appointed by the Governor was not a judicial determination of the question of his sanity and that to refuse him the right of appeal from said Commission would be denying him of his Constitutional rights.
>
> "The State of Georgia contends that he was not entitled, as a matter of law, to the right of appeal from said Commission, and we cite the following Federal cases:"

In this statement Counsel are in error. It is not a question of the denial of an appeal, but a question of the right to be heard.

We insist that the Supreme Court of Georgia in holding that Sections 27-2601 and 27-2602 provide due process of law, is to overlook the principles of law as laid down in Cooley's Constitutional Limitations, Chapter XI, page 353, where it is said, after citing the provisions of the several State Constitutions defining due process of law that:

> "No definition, perhaps, is more often quoted than that by Mr. Webster in the Dartmouth College case: 'By the law of the land is most clearly intended the general law, which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial. The meaning is, that every citizen shall hold his life, liberty, property, and immunities under the protection of general rules which govern society. Every-

thing which may pass under the form of enactment is not the law of the land.'

"The definition here given is apt and suitable as applied to judicial proceedings, which cannot be valid unless they 'proceed upon inquiry', and 'render judgment only after trial.' It is entirely correct, also, in assuming that a legislative enactment is not necessarily the law of the land. The words 'by the law of the land,' as used in the Constitution, do not mean a statute passed for the purpose of working the wrong. That construction would render the restriction absolutely nugatory, and turn this part of the Constitution into mere nonsense. The people would be made to say to the two houses: 'You shall be vested with the legislative power of the State, but no one shall be disfranchised or deprived of any of the rights or privileges of a citizen, unless you pass a statute for that purpose. In other words, you shall not do the wrong, unless you choose to do it'."

The State cannot act upon one of its subjects except when it does so, "according to pre-established regulations," because "Matter without form is chaos; power without form is anarchy. The State were it to disregard forms, would not be a government, but a mob. Its actions would not be administration, but violence. The public authority has a formal embodiment in the State, and when it moves, it moves as it has said by its laws it will move" (as said by Justice Bleckley in *State* v. *Cochran*, 62 Ga. 731). And those laws must conform to the 14th Amendment of the Constitution of the United States.

Much solicitude has been shown for the freedom of speech, the freedom of the press, and freedom of religion, under the 14th Amendment of the Constitution of the United States, and we insist that there should be no turning the back of the hand to one in the plight of petitioner.

Speaking of freedom of speech, and in holding an ordinance of the City of Lockport, New York which required

the procural of a license from the Chief of Police to operate a loud speaker unconstitutional, the Supreme Court of the United States in the case of *Saia* v. *New York*, October Term, 1948 93 L. Ed., page 1089, said:

> "There are no standards prescribed for the exercise of his discretion. . . . The right to be heard is placed in the uncontrolled discretion of the Chief of Police."

So it is with reference to the Governor of Georgia. He "may" appoint a Commission, but no power on earth could compel him to do so. And even though a Commission is appointed "there are no standards prescribed for the exercise" of its "discretion," no right to be heard, or to offer any proof.

We insist the law under discussion is completely lacking in any semblance of constitutional requirement. We do not believe this Court will ever "retreat from the firm position" the Supreme Court of the United States has "taken in the past," but will give the "same preferred treatment" that it has given to "freedom of religion in the Cantwell case, freedom of the press in the Griffin case, and freedom of speech and assembly in the Hayne case," to a law involving human life. (Douglas, Justice, in *Saia* v. *New York*, *supra*.)

The question might be suggested: "Do you expect a Court to release one who stands convicted of murder?" That question is easier posed than answered. The Supreme Court of the United States has held that it would do so before it will permit one to be executed contrary to a constitutional guarantee.

In the case of *Ex Parte Medley*, 33 L. Ed., page 835, the Supreme Court of the United States said (at page 841): 134 U. S. 160:

> "What disposition shall we now make of the prisoner, who is entitled to his discharge from the custody

of the warden of the penitentiary under the order and judgment of the court, because, within the language of section 753, he is in custody in violation of the Constitution of the United States, but who is, nevertheless, guilty, as the record before us shows, of the crime of murder in the first degree? We do not think that we are authorized to remand the prisoner to the custody of the sheriff of the proper county to be proceeded against in the court of Colorado which condemned him, in such a manner as they may think proper, because it is apparent that while the Statute under which he is now held in custody is an ex post facto law in regard to his offense, it repeals the former law, under which he might otherwise have been punished, and we are not advised whether that court possesses any power to deal further with the prisoner or not. Such a question is not before us, because it has not been acted upon by the Court below, and it is neither our inclination nor our duty to decide what the court may or what it may not do in regard to the case as it stands. Upon the whole, after due deliberation, we have come to the conclusion that the attorney-general of the State of Colorado shall be notified by the warden of the penitentiary of the precise time when he will release the prisoner from his custody under the present sentence and warrant at least ten days beforehand, and after doing this, and at that time, he shall discharge the prisoner from his custody; and such will be the order of this court."

In this case there is no officer into whose custody Appellant could be remanded to, who could, or would, do otherwise, than execute him. In *Ex Parte Medley*, this Court evidently thought that there might be.

We quote the language of Chief Justice Stone of this Court in the case of *Ex Parte Richard Quirin*, 317 U. S. 1, 87 L. Ed. 1, (quoting from page 11):

"We are not here concerned with any question of guilt or innocence of petitioner. Constitutional safe-

guards for the protection of all who are charged with offenses are not to be disregarded in order to inflict merited punishment on some who are guilty."

The facts in the Record are admitted by the demurrer, and this Court is not confronted with any conflict with reference thereto.

We advert once more to the *Phyle* case. In speaking of the *Nobles* case, this Court there said:

> "The Nobles case we do understand to be an authority for the principle that a condemned defendant cannot automatically block execution by suggestions of insanity, and that a State tribunal, particularly a judge, must be left free to exercise a reasonable discretion in determining whether the facts warrant a full inquiry and hearing upon the sanity of a person sentenced to death."

But the Georgia Law, as now construed by its highest Court holds that no such law now exists, and that no judge or judicial tribunal has any such authority. At one time Georgia had such a law; now it has none.

We insist that the judgment of the Supreme Court of Georgia should be reversed.

Respectfully submitted,

BENJ. E. PIERCE,
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 77 77

GEORGE W. SOLESBEE,

Appellant,

vs.

R. P. BALKCOM, JR., WARDEN OF THE STATE PENITENTIARY, TATTNALL, GEORGIA

APPEAL FROM THE SUPREME COURT OF THE STATE OF GEORGIA

BRIEF FOR APPELLEE

EUGENE COOK,
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CLAUDE SHAW,
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Assistant Attorney General,
Counsel for Appellee.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 77

GEORGE W. SOLESBEE,

Appellant,

vs.

R. P. BALKCOM, JR.,

Appellee

BRIEF FOR APPELLEE

PART ONE

STATEMENT OF CASE

George W. Solesbee, appellant, was sentenced to death by electrocution and while awaiting the sentence to be executed, the Governor gave him a respite which extended over and beyond the date fixed for the electrocution. The Governor also, acting under authority of Section 27-2602 of the 1933

Code of Georgia Annotated, appointed a Commission to examine into the sanity of said appellant. Said Commission so appointed by the Governor, after making said examination, reported to the Governor that George W. Solesbee, the appellant, was sane. The respite granted by the Governor to the plaintiff in error expired on the 8th day of November, 1948, but on November 5th George W. Solesbee was resentenced to be electrocuted on November 20, 1948. On November 17, 1948, three days before the date set for the electrocution, Solesbee, by and through his attorneys, Price Brothers, presented to the Honorable M. Price, Judge of the Superior Courts of the Atlantic Circuit, a petition for habeas corpus against R. P. Balkcom, Jr., Warden. Said petition is set out on pages 1, 2, 3, 4, 5 and 6 of the Record. Whereupon, the said judge issued the following order (R. 6):

> "The foregoing petition for the writ of habeas corpus read and considered. It is hereby ordered that a copy thereof together with this rule be served upon R. P. Balkcom, Jr. as warden of the penitentiary of the State of Georgia, at Reidsville, Georgia, within the county of Tattnall. It is ordered further that the said R. P. Balkcom, Jr., warden as aforesaid, appear before me at the Court House in Long County, Ludowici, Georgia, on the 27 day of November, 1948 at 11:30 o'clock A. M. and produce at such hearing the body of said George W. Solesbee in order that the legality of his incarceration may be inquired into and determined and also the legality of such authority as the said R. P. Balkcom, Jr. warden as aforesaid, is purporting to execute the death sentence upon the said George W. Solesbee. Ordered further that the said R. P. Balkcom, Jr. warden as aforesaid, be and he is hereby temporarily restrained from proceeding further with execution of said George W. Solesbee until the further order of this Court. This 17 day of November, 1948."

and, as the order shows, the Warden was ordered and directed to appear in Court, at the Courthouse in Long County, Ludowici, Georgia, on the 27th day of November, 1948, and to produce the body of George W. Solesbee.

This was for the purpose of having a hearing on the petition for writ of habeas corpus. The case was sounded for trial, and counsel for the warden interposed a demurrer to the petition upon the following grounds:

1. That there is no cause of action set out in said petition.

2. That if the sentence of death passed by Honorable W. R. Smith, Judge of the Superior Court of the Alapaha Circuit, was void, that this question is now moot as the time for the execution of the said George Solesbee had already passed and it would be necessary for him to be resentenced before he can be put to death by electrocution.

3. The warden says further that there is no conflict between the two Code Sections referred to in Paragraph 5 in said petition; that the method provided by law for inquiring into the sanity of a person already under sentence of death is not in violation of the Constitution of Georgia nor the Constitution of the United States, and that the method provided for does not deprive a person of his life without due process of law.

and the Court entered an order sustaining such demurrer as follows:

"After hearing argument on the within demurrer and after consideration thereof, it is adjudged by the Court that the within demurrer be, and the same is hereby sustained and said petition is hereby dismissed, on the

ground that Section 27-2602 of the Civil Code affords due process of law to the applicant, which redress was afforded in the instant case by reason of the fact as alleged in said petition; the Governor appointed a commission for the purpose of determining the question of the applicant's sanity or insanity, and said commission rendering a finding that the applicant was sane.

"This being the judgment of the Court, said applicant is hereby remanded to the custody of said respondent.

"At Chambers, Ludowici, Georgia, this Nov. 27, 1948.
(S.) M. PRICE, J. S. C. A. C."

and from this ruling, George W. Solesbee, the appellant, appealed to the Supreme Court of Georgia, in which appeal he contended that the sustaining of the demurrer to his writ of habeas corpus deprived him of his Constitutional rights.

When his appeal reached the Supreme Court of Georgia, the Supreme Court sustained the lower court in its ruling in sustaining the demurrer and remanding appellant to the Warden, and it is from this ruling that the appellant brings his case by appeal to the Supreme Court of the United States in which he prays that the Supreme Court of Georgia be reversed in their ruling.

PART TWO

Argument and Citation of Authority

The appellant does not contend that he did not have a fair trial. He does not claim that his conviction was illegal but does contend that Section 27-2602 of the 1933 Code of Georgia and Section 27-2603 are repugnant to the Constitution of the United States. It is the contention of the appellee, the State of Georgia, that the above Sections of the Code of Georgia do not violate any provision of the Constitution of the State of Georgia nor of the Federal Constitution.

The State further contends that George W. Solesbee is not being illegally detained or being deprived of any of his Constitutional rights. We insist that the Supreme Court of Georgia did not err in sustaining the Superior Court Judge in dismissing Solesbee's writ of habeas corpus.

We cite the following cases:

Baughn v. *The State*, 100 Ga. 554, 559 (28 S. E. 68) (38 L. R. A. 577);
Mallory v. *Chapman*, 158 Ga. 228, 231 (122 S. E. 884);
Gore v. *Humphries*, 163 Ga. 106, 111 (135 S. E. 481);
Smith v. *Henderson*, 190 Ga. 886 (2) (10 S. E. 2d, 921);
Fowler v. *Grimes*, 198 Ga. 84, 94 (31 S. E. 2d, 174).

The appellant contends that he is being deprived of his Constitutional rights because there is no provision of Georgia Law under which he may appeal from the decision of the Commission appointed by the Governor to examine into his sanity. The State of Georgia submits that there is no merit to this contention since the law of Georgia makes no provision for such appeal. No person who has been convicted of a capital offense shall be entitled to any inquisition or trial to determine his sanity.

The appellant contends that the Commission appointed by the Governor was not a judicial determination of the question of his sanity and that to refuse him the right of appeal from said Commission would be denying him of his Constitutional rights.

The State of Georgia contends that he was not entitled as a matter of law, to the right of appeal from said Commission and we cite the following Federal cases:

Dreyer v. *Illinois*, 187 U. S. Rep. 71;
Reetz v. *Michigan*, 188 U. S. Rep. 505.

WHEREFORE, the appellee, the State of Georgia, prays that the judgment of the Supreme Court of the State of Georgia be sustained.

Respectfully submitted,

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